

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

RAD REFERRAL: 08L-19

DATE OF REFERRAL: May 1, 2008

DATE ACTIVATED: May 15, 2008

STATUTE OF LIMITATIONS: October 1, 2011

SOURCE:

INTERNALLY GENERATED

RESPONDENTS:

Republican Party of Minnesota and
Anthony G. Sutton, in his official capacity as
treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 434(b)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b(a)
11 C.F.R. § 102.5(a)
11 C.F.R. § 106.7(f)

INTERNAL REPORTS CHECKED:

Disclosure Reports
RAD Referral Materials

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Reports Analysis Division ("RAD") referred the Republican Party of Minnesota ("RPM" or "the Committee") and Anthony G. Sutton, in his official capacity as treasurer, to this Office for disclosing \$1,269,578.74 in apparent excessive transfers from its non-federal account for allocable administrative activity disclosed on the Amended 2006 12-Day Pre-General, Amended 2006 30-Day Post-General, and Amended 2006 Year-End Reports. Due to subsequent amendments filed by the Committee after the referral, the total amount of excessive transfers increased to \$1,404,136.84.

RPM was also referred by RAD for failing to clarify whether disbursements for apparent public communications, totaling \$543,702.91 on the Amended 2006 30-Day Post-General Report, meet the definition of federal election activity, expressly advocate the election or defeat of a clearly identified federal candidate, or qualify as exempt party activity. As discussed below, this activity may require further disclosure.

Based on the available information, we recommend that the Commission find reason to believe that the Republican Party of Minnesota and Anthony G. Sutton, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441b(a), and 441a(f), and 11 C.F.R. §§ 102.5(a) and 106.7(f), and authorize an investigation to determine whether the apparent public communications required further disclosure.

II. FACTUAL AND LEGAL ANALYSIS

A. Excessive Non-Federal Transfers for Allocated Administrative Expenses

It appears that RPM made an excessive transfer of over \$1.4 million of non-federal funds for allocated administrative expenses that may have resulted in impermissible transfers of contributions prohibited in connection with federal elections to the Committee's federal account. The excessive transfers are summarized in the chart below:

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Report	Schedule H3 for Line 18(a): Transfers from Non- Federal Account for Allocated Activity	Schedule H4 for Line 21(a)(ii): Non-Federal Share of Allocable Administrative Expenses	Apparent Excessive Amount
2006 Amended 12- Day Pre-General Report (filed 5/21/08)	\$150,000.00	\$42,633.39	\$107,366.61
2006 Amended 30- Day Post-General Report (filed 5/21/08)	\$1,191,924.40	\$77,464.13	\$1,114,460.27
2006 Amended Year- End Report (filed 5/21/08)	\$221,211.48	\$38,901.52	\$182,309.96
Total	\$1,563,135.88	\$158,999.04	\$1,404,136.84

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3 RAD sent an initial Request for Additional Information ("RFAI") to RPM regarding the
4 transfers on June 6, 2007, recommending that RPM transfer the excessive amount back to the
5 non-federal account. Although RAD contacted RPM multiple times from June 2007 through
6 April 2008, RPM never transferred the excessive amount. Instead, RPM indicated that it was in
7 the process of a "thorough review" of its finances. RPM began filing amended reports for
8 2002-2007 activity in May 2008, changing some of the figures at issue in this referral.

9 The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits the
10 making or knowing acceptance of corporate or labor organization contributions or expenditures
11 in connection with a federal election. 2 U.S.C. § 441b(a). Further, the Act provides that no
12 person shall make contributions to a state party committee's federal account in any calendar year
13 which in the aggregate exceed \$10,000, and prohibits the state committee from knowingly
14 accepting such contributions. 2 U.S.C. § 441a(a) and (f). Under Minnesota campaign finance
15 law, corporations are prohibited from making contributions to political parties; however, labor
16 organizations are permitted to make such contributions. In addition, there is no contribution

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1 limit for permissible sources giving to political parties. Minnesota Statute Chapter 10A, Section
2 27.

3 Where a committee has established both a federal and a non-federal account, "only funds
4 subject to the limitations and prohibitions of the Act shall be deposited into such separate federal
5 account." 11 C.F.R. § 102.5(a)(1)(i). State party committees may transfer funds from their non-
6 federal account to their federal account solely to meet allocable expenses, such as administrative
7 costs that are not directly attributable to a clearly identified federal candidate. 11 C.F.R.

8 § 106.7(f). Under this provision, the committee must pay the entire amount of an allocable
9 expense from their federal account and transfer funds from their non-federal account to the
10 federal account solely to cover the non-federal share of that allocable expense. 11 C.F.R.

11 § 106.7(f)(1)(i). The committee must transfer funds from the non-federal to the federal account
12 to meet allocable expenses no more than 10 days before and no more than 60 days after the
13 payments for which they are designated are made from the federal account. 11 C.F.R.

14 § 106.7(f)(2)(i). Any portion of a transfer from a committee's non-federal account to its federal
15 account that does not meet these timing requirements is presumed to be a loan or a contribution
16 from the non-federal account to the federal account, in violation of the Act. 11 C.F.R.

17 § 106.7(f)(2)(ii).

18 Based on the information contained in the RAD referral, it appears that RPM did not
19 properly allocate administrative expenses between its federal and non-federal accounts, and that
20 the non-federal account transfers to the federal account may have contained funds prohibited in
21 connection with federal elections. See 2 U.S.C. §§ 441a(a) and (f) and 441b(a); Minnesota
22 Statute Chapter 10A, Section 27. RPM's amended reports have actually increased the amount of
23 the excessive transfers from the non-federal account from over \$1.25 million to over \$1.4

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1 million. Because there appears to be excessive transfers regardless of the latest amendments, and
2 these transfers may contain contributions prohibited in connection with a federal election, we
3 recommend that the Commission find reason to believe that the Republican Party of Minnesota
4 and Anthony G. Sutton, in his official capacity as treasurer, violated 2 U.S.C. §§ 441b(a) and
5 441a(f) and 11 C.F.R. §§ 102.5(a) and 106.7(f).

6 **B. Failure to Clarify Disbursements for Public Communications**

7 RPM disclosed \$543,702.91 in disbursements for apparent public communications on the
8 Amended 2006 30-Day Post-General Report. RAD identified disbursements for
9 "Communications consultant" (\$2,500.00), "GOTV phonebanks" (\$250,000), "GOTV self-
10 mailer" (\$61,317.06), and "GOTV self-mailers" (\$220,885.85) characterized as federal election
11 activity on Schedule B for Form 3X Line 30(b), that did not provide any information to
12 determine whether this activity was exempt or federal election activity. As a result, RAD was
13 unable to determine whether these disbursements may require additional or different reporting,
14 including which candidate(s) the activity should be attributed to. RAD addressed this issue
15 regarding the apparent public communications in an RFAI to RPM on June 6, 2007, requesting
16 additional information. RPM's response to this RFAI was similar to its response regarding the
17 excessive transfers from the non-federal account for allocated administrative expenses. On
18 several occasions from June 2007 through April 2008, representatives of RPM indicated to RAD
19 that the Committee was undergoing an extensive audit and anticipated filing amendments to its
20 reports. Despite these assurances, RPM did not provide RAD with any information to address
21 RAD's concerns about the communications. RPM's amendments filed in May 2008 did not
22 clarify this issue.

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1 Federal election activity includes voter registration, get-out-the-vote, and generic
2 campaign activity, as well as public communications that refer to a clearly identified candidate
3 for federal office and that promote, support, attack or oppose any candidate for that office.
4 2 U.S.C. § 431(20)(A)(i), (ii), and (iii); 11 C.F.R. § 100.24.¹ Public communications are
5 communications by means of any broadcast, cable, or satellite communication, newspaper,
6 magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or
7 any other form of general public political advertising. 2 U.S.C. § 431(22); 11 C.F.R. § 100.26.
8 Public communications that meet the definition of federal election activity and that also contain
9 express advocacy as defined under 11 C.F.R. § 100.22, but do not meet the conditions of exempt
10 activity under 2 U.S.C. § 431(8)(B) and (9)(B),² would constitute one of the following:

- 11 ■ An in-kind contribution to the identified candidate. In-kind contributions are goods or
12 services provided by the party committee to a candidate at no charge or at less than the
13 usual charge. See 11 C.F.R. § 100.52(d)(1). In-kind contributions by party committees
14 must be reported on Schedule B for Form 3X Line 23 as contributions to identified
15 candidates.
- 16
17 ■ An independent expenditure on behalf of or in opposition to a candidate. An independent
18 expenditure is an expenditure for a communication that expressly advocates the election
19 or defeat of a clearly identified candidate and is not made in concert or cooperation with
20 or at the request or suggestion of such candidate, the candidate's authorized political
21 committee, or their agents. See 2 U.S.C. § 431(17). Independent expenditures by party
22 committees must be reported on Schedule E for Form 3X Line 24, along with the names of
23 the candidate supported or opposed by the expenditure.
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¹ The U.S. District Court for the District of Columbia held in *Shays III* that the definitions of "voter registration activity" and "get-out-the-vote activity" contained in 11 C.F.R. § 100.24(a)(2)-(a)(3) violate both *Chevron* step two and the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. See *Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007). On June 13, 2008, the D.C. Circuit affirmed the District Court. See *Shays v. F.E.C.*, No. 07-5360, 2008 WL 2388661 (D.C. Cir. June 13, 2008).

² Examples of exempt activity include the payment by a state party committee for the costs of campaign materials used by the committee in connection with volunteer activities on behalf of the nominees of that party, and the payment by a state party committee of the costs of voter registration and get-out-the-vote activities on behalf of the Presidential and Vice Presidential nominees of that party. 2 U.S.C. § 431(8)(B)(ix) and (xi) and (9)(B)(viii) and (ix).

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1 ▪ A coordinated party expenditure. A coordinated party expenditure is an expenditure for a
2 communication that is made in cooperation, consultation or concert with, or at the request
3 or suggestion of, a candidate, a candidate's authorized committee, or their agents. See
4 2 U.S.C. § 441a(d). Coordinated party expenditures must be reported by party
5 committees on Schedule F for Form 3X Line 25, along with the name of the candidate
6 with whom the expenditure was coordinated.
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8 Because RPM may not have properly reported its disbursements for apparent public
9 communications, a limited investigation will be necessary to determine whether the
10 communications refer to a clearly identified candidate for federal office and promote, support,
11 attack or oppose any candidate for federal office. It is also possible that the communications
12 contain express advocacy but do not meet the conditions of exempt activity, and constitute in-
13 kind contributions, independent expenditures or coordinated party expenditures, and should have
14 been disclosed on a Schedule B, E or F for Form 3X Lines 23, 24, or 25. This may also
15 implicate other provisions of the Act, such as 2 U.S.C. § 441a(a) for making excessive
16 contributions to candidates and 2 U.S.C. § 434(g) for failure to report independent expenditures.

17 Accordingly, we recommend that the Commission find reason to believe the Republican
18 Party of Minnesota and Anthony G. Sutton, in his official capacity as treasurer, violated 2 U.S.C.
19 § 434(b) by failing to properly report disbursements for apparent public communications.

20 III. INVESTIGATION

21 We recommend that the Commission approve an investigation, including the use of
22 compulsory process, for the purpose of determining the nature of the apparent public
23 communications disclosed in RPM's Amended 2006 30-Day Post-General Report. Further, we
24 propose merging this matter with MUR 5926, a complaint-generated matter pending against
25 RPM regarding allegations that the Committee failed to disclose debts and obligations of
26 \$100,000 or more and failed to report unreimbursed staff advances as contributions and
27 outstanding debts, from approximately May 2006 to at least February 2007. See MUR 5926

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First General Counsel's Report. The First General Counsel's Report in that matter also recommends an investigation and we anticipate conducting a single unified investigation covering all pending issues.


IV. RECOMMENDATIONS

1. Open a Matter Under Review with respect to RR 08L-19 and merge the new MUR into MUR 5926;
2. Find reason to believe that the Republican Party of Minnesota and Anthony G. Sutton, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441b(a), and 441a(f), and 11 C.F.R. §§ 102.5(a) and 106.7(f);
3. Approve the attached Factual and Legal Analysis;
4. Authorize the use of compulsory process; and
5. Approve the appropriate letter.

Thomasenia P. Duncan
General Counsel

8-13-08
Date

BY:


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